

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ZIHENG XING.

Case No. 2:20-cv-01593-MMD-BNW

Plaintiff.

ORDER

v.

USA GOOD TRAVEL AND TOUR INC. et
al.,

Defendants

I. SUMMARY

Plaintiff Ziheng Xing sued Defendants USA Good Travel and Tour Inc. d/b/a Mei Tour (“Mei Tour”), Kongming Yan, Doe Defendants 1-100, and Roe Entities 1-100 (collectively, “Defendants”) for unpaid overtime compensation, unfair labor practices, declaratory relief, and other relief under the Fair Labor Standards Act (“FLSA”). (ECF No. 1 at 2, 5.) Before the Court is Plaintiff’s unopposed motion for summary judgment against Defendant Kongming Yan (“Defendant”).¹ (ECF No. 57 (“Motion”).) The Court will grant the Motion in part—where recovery is available—because Defendant violated both FLSA and Nevada Revised Statutes § 608 (“Section 608”) and was unjustly enriched. But the Court will deny the Motion in part where recovery is unavailable, and where Plaintiff failed to present evidence supporting his claims.

II. BACKGROUND

Defendants employed Plaintiff from August 27, 2018, to approximately August 10, 2019. (ECF No. 44 at 3.) Plaintiff's rate of pay was \$11.00 per hour. (*Id.*) In 2018, Plaintiff worked 279 hours and Defendant owed him \$3,069.00 in gross wages, but he only

¹As further explained below, Plaintiff already obtained a default judgment against Mei Tour. (ECF No. 44.)

1 received \$2,416.50. (*Id.*) The following year, Plaintiff worked 1,223 hours and received
 2 \$1,226.00 but was owed \$13,453.00. (*Id.*)

3 Additionally, Defendants required Plaintiff to work 307.5 overtime hours during his
 4 employment but failed to compensate him with overtime pay. (*Id.* at 5.) They also denied
 5 Plaintiff a total of 120.75 hours of break time and failed to reimburse Plaintiff for out-of-
 6 pocket expenses totaling \$462.37. (*Id.*)

7 In 2020, Plaintiff filed suit against Defendants Mei Tour and Kongming Yan. (*Id.* at
 8 1.) United States Magistrate Judge Brenda Weksler issued a report and recommendation
 9 that default judgment be entered against Mei Tour. (ECF No. 31 at 1.) The Court adopted
 10 the report and recommendation in full and directed Plaintiff to file a motion for default
 11 judgment. (ECF No. 32 at 2.) Plaintiff filed the motion; Mei Tour submitted no response.
 12 (ECF No. 38.) The Court granted the motion. (ECF No. 40 at 1.) Plaintiff now moves for
 13 summary judgment against Defendant. (ECF No. 57.) Defendant did not oppose or
 14 otherwise respond to Plaintiff's Motion.

15 **III. DISCUSSION**

16 Plaintiff moves for summary judgment on his uncompensated work time claims,
 17 uncompensated overtime claims, a denial of breaks claim, an unjust enrichment claim,
 18 and a civil conspiracy claim. In seeking summary judgment, the moving party bears the
 19 burden of showing that there is no genuine issue as to any material fact. See FED. R. CIV.
 20 P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party
 21 satisfies Rule 56's requirements, the burden shifts to the nonmoving party to "set forth
 22 specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*,
 23 477 U.S. 242, 256 (1986). Here, Defendant did not respond to Plaintiff's Motion.
 24 While the court may not enter summary judgment by default under LR 7-2(d), it may grant
 25 an unopposed summary judgment motion if "the movant's papers sufficiently support the
 26 motion and do not present on their face a genuine issue of material fact." *Miles v. Clark Cnty.*,
 27 No. 2:21-CV-00290-CDS-BNW, 2024 WL 1720823, at *2 (D. Nev. Apr. 22, 2024)

1 (citing *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993)). The Court will
 2 therefore analyze the unopposed motion using this standard.

3 **A. Uncompensated Work Time**

4 Plaintiff proffers evidence that Defendant failed to pay him \$12,882.50 of his base
 5 pay, specifically a declaration,² his 2018 W-2 Wage and Tax Statement, and his 2019
 6 1099-MISC form. (ECF Nos. 57 at 4, 57-1 at 2-5, 21, 23.) These exhibits show that
 7 Defendant failed to pay Plaintiff's full wages. (*Id.*) As further explained below, Plaintiff is
 8 thus entitled to judgment as a matter of law on his uncompensated work claims brought
 9 under Section 608.

10 Plaintiff makes his uncompensated work time argument under both FLSA and
 11 Section 608. (ECF No. 57 at 9, 11.) However, state law, rather than FLSA, guides unpaid
 12 wage claims because FLSA does not provide a private cause of action for unpaid wages
 13 outside of minimum wage and overtime. *See* 29 U.S.C. § 216(b); *see also Jasic v. Kora*,
 14 No. 2:13-cv-01747-JAD, 2013 WL 5883406, at *3 (D. Nev. Oct. 30, 2013) (citations
 15 omitted) (stating that unpaid wages should be determined under state law rather than
 16 federal law); *Brown v. Precision Opinion*, No. 2:11-cv-00392-PMP, 2011 WL 1257210, at
 17 *3 (D. Nev. Apr. 4, 2011) (citations omitted) (same). Accordingly, Plaintiff may only
 18 recover under Section 608. *See Neville v. Eighth Judicial Dist. Court of Nev.*, 406 P.3d
 19 499, 504 (Nev. 2017) (holding that Section 608 implies a cause of action).

20 Under Section 608, Plaintiff argues he is entitled to damages for uncompensated
 21 work time because NRS § 608.016 states that "an employer shall pay to the employee
 22 wages for each hour the employee works." (ECF No. 57 at 11.) The Court agrees. The
 23 Motion is therefore granted as to this claim because Defendant violated NRS § 608.016
 24 by failing to pay Plaintiff for all the hours he worked. (ECF Nos. 57-1 at 2-5, 21, 23.)

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26

27 ²In the default judgment, the Court stated that "except as to damages, the Court
 28 takes all of the statements in the Xing Declaration as true and hereby incorporates them
 as such in these Findings of Facts." (ECF No. 44 at 6.) The Court accordingly treats the
 statements laid out in the declaration as facts.

1 **B. Uncompensated Overtime**

2 Plaintiff also argues he is entitled to summary judgment on his uncompensated
 3 overtime claim under FLSA and Section 608 because Defendant failed to pay him
 4 \$2,536.88 in owed overtime wages. (ECF No. 57 at 10, 11-12.) Plaintiff supports this
 5 argument with a declaration, his work schedule while employed by Defendant, his 2018
 6 W-2 Wage and Tax Statement, and his 2019 1099-MISC form. (ECF Nos. 57-1 at 2-5,
 7 21, 23.) These documents show that Plaintiff worked overtime hours but was not properly
 8 compensated. (*Id.*) As further explained below, Plaintiff is accordingly entitled to judgment
 9 as a matter of law on his uncompensated overtime claims brought under FLSA and
 10 Section 608.

11 FLSA mandates employers to pay employees an overtime rate of at least one-and-
 12 one-half times their regular rate after an employee works forty hours in one week. See 29
 13 U.S.C. § 207(a)(1). NRS § 608.018 is FLSA's state-law analogue on overtime
 14 compensation and mandates the same requirements.

15 “In order to prevail on an unpaid overtime claim under the FLSA, a plaintiff must
 16 prove: (1) the uncompensated activity constitutes work, (2) the time worked is not de
 17 minimis and is reasonable in relation to the principal activity, (3) the employer had actual
 18 notice or constructive knowledge of the plaintiff’s overtime work, and (4) the amount of
 19 time worked.” *Corbett v. Pub. Employees’ Ret. Sys.*, No. 2:20-cv-02149-KJD-NJK, 2023
 20 WL 2663204, at *6 (D. Nev. Mar. 28, 2023) (citing *Marshall v. Pollin Hotels II, LLC*, 10 F.
 21 Supp. 3d 1290, 1297 (D. Ore. 2016)). Plaintiff satisfies this test, mostly because his work
 22 schedule (ECF No. 57-1 at 7-19) shows that Mei Tour scheduled him to work more than
 23 eight hours per day on some specified days. Plaintiff’s Motion is therefore granted as to
 24 this claim because Defendant did not pay the one-and-a-half-time rate for his overtime
 25 hours in violation of FLSA and Section 608. (*Id.* at 2-5, 21, 23.)

26 **C. Denial of Breaks and Meal Periods**

27 Plaintiff then argues he is entitled to summary judgment on his denial of breaks
 28 and meal periods claim under FLSA and Section 608 because Defendant regularly

1 refused him paid breaks and unpaid meal periods (ECF No. 57 at 11, 12), supporting this
 2 argument with a declaration and work schedule both documenting missing break periods
 3 (ECF No. 57-1 at 2-19). But “[r]est periods of short duration, running from 5 minutes to
 4 about 20 minutes, are common in industry” and must be counted as hours worked. 29
 5 C.F.R. § 785.18. Said otherwise, “the FLSA does not require that employers provide meal
 6 or rest periods.” *Maia v. Petrochem Insulation, Inc.*, 5 F.4th 1068, 1073 (9th Cir. 2021);
 7 *see also Handy Reference Guide to the Fair Labor Standards Act*, U.S. DEPT OF LAB.,
 8 <https://www.perma.cc/EC33-KF3U> (last visited Oct. 17, 2024) (stating that FLSA does not
 9 mandate meal or rest periods). Plaintiff is therefore not entitled to summary judgment on
 10 this claim because Defendant did not violate FLSA in failing to provide short rest breaks.

11 That said, Section 608 does mandate that employers authorize employees to take
 12 rest periods and that these periods be counted as hours worked with no deduction from
 13 wages, and that an employer cannot employ someone for a continuous period of eight
 14 hours without permitting them a meal period of at least 30 minutes. See NRS
 15 § 608.019(1). However, NRS § 608.019 does not include an implied private right of action.
 16 See e.g., *Sandoval v. Drybar Holdings, LLC*, No. 2:19-cv-00180-RFB-EJY, 2020 WL
 17 13846688, *8 (D. Nev. Mar. 24, 2020) (“The Court finds a private right of action is not
 18 implied in [NRS § 608.019].”); *Cueto-Reyes v. All My Sons Moving Co. of LV.*, No. 2:09-
 19 cv-2299-ECR-RJJ, 2010 WL 11579989, at *2 (D. Nev. Apr. 5, 2010) (“We conclude,
 20 therefore, that there is no private right of action to bring suit for violation of section
 21 608.019; rather, the remedy for such violations is to bring an administrative claim before
 22 the Nevada Labor Commissioner.”). Thus, the Court denies Plaintiff’s Motion as to this
 23 claim and dismisses this claim because he cannot recover under either FLSA or
 24 Section 608.

25 **D. Unjust Enrichment**

26 Plaintiff next argues that he is entitled to summary judgment on his unjust
 27 enrichment claim because Defendant received the benefit of Plaintiff’s out-of-pocket
 28 expenses of \$462.37 that Defendant promised—but failed—to reimburse him for. (ECF

1 No. 57 at 13.) Plaintiff supports this argument with evidence in the form of his declaration
 2 and a receipt of the expenses. (ECF No. 57-1 at 2-5, 28-30.) The Court agrees Plaintiff is
 3 entitled to summary judgment on his unjust enrichment claim.

4 Unjust enrichment is the unjust retention of a benefit to the loss of another, or the
 5 retention of money or property of another against the fundamental principles of justice or
 6 equity and good conscience. See *Asphalt Prods. Corp. v. All Star Ready Mix*, 898 P.2d
 7 699, 701 (Nev. 1995) (citation omitted). “Unjust enrichment exists when the plaintiff
 8 confers a benefit on the defendant, the defendant appreciates such benefit, and there is
 9 acceptance and retention by the defendant of such benefit under circumstances such that
 10 it would be inequitable for him to retain the benefit without payment of the value thereof.”
 11 *Korte Constr. Co. v. State*, 492 P.3d 540, 543 (Nev. 2021) (citing *Certified Fire Prot., Inc.*
 12 v. *Precision Constr., Inc.*, 283 P.3d 250, 257 (Nev. 2012)).

13 Plaintiff proffered evidence that he conferred the benefit of \$462.37 on Defendant,
 14 Defendant appreciated this benefit, and that Defendant both accepted and retained it by
 15 failing to reimburse Plaintiff as promised.³ (ECF No. 57 at 13.) Therefore, the Court grants
 16 Plaintiff’s Motion as to this claim because Defendant was unjustly enriched by
 17 Plaintiff’s \$462.37.

18 **E. Civil Conspiracy**

19 Plaintiff finally argues he is entitled to summary judgment on his civil conspiracy
 20 claim because “Yan and Mei Tour knowingly acted in concert and in a conspiratorial
 21 fashion with each other and perhaps others to violate labor laws and to take advantage
 22 of Plaintiff and those similarly situated,” and because the Court already found Mei Tour
 23 liable for civil conspiracy through the default judgment. (*Id.* at 14.) However, Plaintiff
 24 proffered no evidence with his Motion tending to show that Defendants Yan and Mei Tour,
 25

26 ³Unjust enrichment only applies where no “express, written contract” exists
 27 between parties. *LeasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*,
 28 942 P.2d 182, 187 (Nev. 1997) (citation omitted). No written employment contract
 between the parties appears to exist, and though Defendant and Plaintiff agreed that
 Defendant would reimburse Plaintiff, this promise was not an express, written contract.
 (*Id.*) Unjust enrichment thus fits here.

1 acting together, intended to accomplish an unlawful objective for the purpose of harming
2 him. See *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 862 P.2d 1207, 1210 (Nev.
3 1993) (citation omitted) (holding that to state a valid claim for civil conspiracy, a plaintiff
4 must show that defendants, by acting in concert, intended to accomplish an unlawful
5 objective for the purpose of harming the plaintiff and that the plaintiff sustained damages
6 as a result). He instead argues that the Court held Mei Tour liable for civil conspiracy, so
7 therefore Defendant should also be held liable as a coconspirator. (ECF No. 57 at 14.)
8 But Plaintiff has not demonstrated that he is entitled to summary judgment because he
9 has not presented any supporting evidence showing that Defendant acted as a
10 coconspirator. The Court accordingly denies Plaintiff's Motion as to this claim.

11 | IV. DAMAGES

12 Plaintiff has presented sufficient evidence showing actual damages of base-pay
13 shortfall, uncompensated overtime pay, and out-of-pocket expenses. (*Id.*) Plaintiff is
14 entitled to judgment as follows:

15	Base-pay shortfall:	\$12,882.50
16	Uncompensated overtime pay:	\$2,536.88
17	Out of pocket expenses:	\$462.37
18	Total:	\$15,881.75

19 Plaintiff also requests liquidated damages. (*Id.* at 15.) FLSA sets liquidated
20 damages at an additional amount equal to his actual damages (double damages). See
21 29 U.S.C. § 216(b). Under the FLSA, Plaintiff may recover his uncompensated overtime
22 pay (\$2,536.88) and out-of-pocket expenses (\$462.37), totaling \$2,999.25.⁴ Thus, as
23 liquidated damages, Plaintiff is entitled to an additional \$5,998.50.

24 Plaintiff is further entitled to reasonable attorneys' fees and court costs under FLSA
25 and Section 608. See 29 U.S.C. § 216(b); NRS § 608.260(2)(b). Plaintiff continues to

27 ⁴As discussed previously, Plaintiff may not receive FLSA liquidated damages for
28 his base-pay shortfall because these damages are recoverable under Section 608, not
the FLSA.

1 incur attorneys' fees and costs related to the litigation of his claims against Defendant.
2 The Court will therefore grant Plaintiff leave to file a verified bill of costs consistent with
3 LR 54-1 and an affidavit of fees consistent with LR 54-14. Plaintiff is also entitled to pre-
4 and post-judgment interest per the terms of NRS § 17.130. Plaintiff's attorney must
5 accordingly include with their written attorneys' fees submission updated damages totals
6 taking the amounts included above and adding the appropriate pre- and post-judgment
7 interest amounts to them.

8 **V. CONCLUSION**

9 The Court notes that Plaintiff made several arguments and cited several cases not
10 discussed above. The Court reviewed these arguments and cases and determines that
11 they do not warrant discussion as they do not affect the outcome of the Motion before
12 the Court.

13 It is therefore ordered that Plaintiff's motion for summary judgment (ECF No. 57)
14 is granted as to the uncompensated work time, uncompensated overtime, and unjust
15 enrichment claims. The Motion is denied as to the denial of breaks and meal periods claim
16 and dismisses this claim. The Motion is also denied as to the civil conspiracy claim, which
17 leaves this claim remaining for trial.

18 It is further ordered that, under Fed. R. Civ. P. 54(d) and consistent with LR 54-14,
19 Plaintiff must, within 14 days from the date of entry of this order, file a written affidavit or
20 declaration verifying his claimed attorneys' fees and updated damages amounts including
21 pre- and post-judgment interest according to the applicable standards. Plaintiff may also
22 simultaneously file a bill of costs that complies with LR 54-1.

23 Its further ordered that, at the same time Plaintiff files his declaration verifying
24 attorneys' fees and damages amounts including pre- and post-judgment interest, Plaintiff
25 must also file a written notice as to whether he intends to proceed to trial on his remaining
26 claims. If he chooses not to, he may instead file a written notice of dismissal of his
27 remaining claims without prejudice at that time.

28

1 Its further ordered that Plaintiff files a notice stating whether he intends to proceed
2 to trial on his sole remaining civil conspiracy within 7 days. Failure to file the notice will be
3 construed as Plaintiff electing to voluntarily dismiss the civil conspiracy claim, particularly
4 given the monetary relief granted in this order.

5 DATED THIS 23rd Day of October 2024.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE